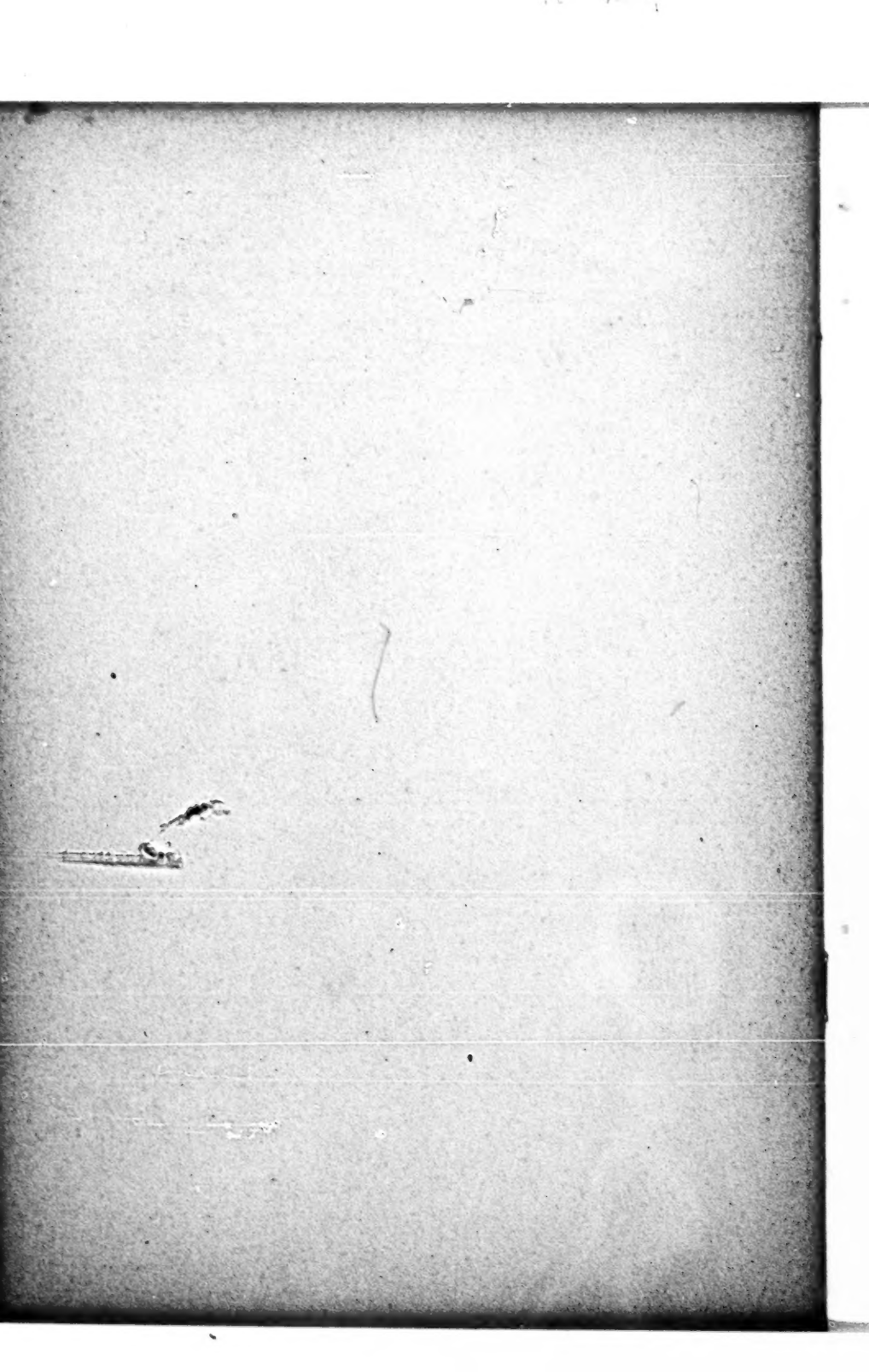

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
Bureau of Employees Compensation,
and
MARY JONES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Respondent, Mary Jones, as guardian of the incompetent claimant, Charles E. Jones, files this brief in opposition to the petition of Intercounty Construction Corp. and Hartford Accident & Indemnity Company praying for a Writ of Certiorari to be issued for the review of the judgment

and opinion of the United States Court of Appeals for the District of Columbia Circuit entered herein on 3 July 1974.

QUESTIONS PRESENTED

The question is felt to be more accurately stated as:

Where an injured claimant has duly filed a claim under §913 of the Longshoremen's and Harbor Workers' Compensation Act, as applicable to the District of Columbia, and the carrier[1] in its answer denied claimant was permanently disabled, and the claimant only received compensation for temporary disability paid under §914(a), (b) and (e) of the Act without any hearing and order on the claim by the deputy commissioner, does §922 of the Act extinguish the claimant's unadjudicated claim for compensation for permanent disability unless the claimant files another claim within one year after receiving the last payment for temporary disability compensation?

STATUTES INVOLVED

Applicable additional sections of the United States Code, Title 33:

§914. Payment of compensation

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge

[1] "Carrier" refers throughout to the Petitioners, Intercounty Construction Corp., the employer, and to Hartford Accident & Indemnity Company, the carrier.

of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

* * * * *

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

* * * * *

(m) The total money allowance payable to an employee as compensation for an injury under this chapter shall in no event exceed in the aggregate the sum of $17,280: *Provided,* That this limitation shall not apply to cases of permanent total disability or death: *And provided further,* That in applying this limitation there shall not be taken into account any amount payable under section 908(g) of this title for maintenance during rehabilitation or any amount of additional compensation required to be paid under this section for delay or default in the payment of compensation or any amount accruing as interest upon defaulted compensation collectible under section 918 of this title.

4 Mar. 1927, c.509, §14, 44 Stat.1432
26 Jul. 1956, c.735, §5, 70 Stat.665.

STATEMENT OF THE CASE

This Respondent adopts the Petitioners' Statement of the Case, except to add that, in Petitioners' reference to the deputy commissioner's 24 May 1971 compensation order which rejected claimant's claim for compensation as being time-barred (Petition pgs. 7-8), the deputy commissioner did find that the claimant was permanently and totally disabled in the course of his employment (App. 2).

REASONS FOR NOT GRANTING THE WRIT

There is no need for the Court to exercise its discretion to issue its Writ of Certiorari to review the case below. The facts in the claimant, *Jones,* case below are different from that in *Strachan Shipping Co. v. Hollis* 460 F.2d 1108 (5th Cir. 1972) *cert. denied* 409 U.S. 887, *reh. denied* 409 U.S. 1002 (1972).

In *Strachan* the claimant and the carrier, in the fifth of many prehearing conferences, agreed before the claims examiner that claimant had suffered a 12% permanent partial loss of use of the left leg, the claims examiner in his memorandum of the conference recommended that the carrier make voluntary payment of the compensation due for this permanent partial disability which the carrier so paid. The Fifth Circuit adopted the position of the district court below that this was a "last payment" within §922 of the Act thereby triggering the one-year bar under this section. *Strachan,* pages 1111, 1114 and 1116. In this case below, there was no "last payment" to the claimant, Jones, as in *Strachan.* The claimant, Jones, had merely received the total of $17,280.00 as temporary disability compensation as authorized by §914(m) of the Act, and there was no agreement and payment (or payment without agreement) of permanent disability compensation as in *Strachan.* (Petitioners' App. 4a)

Under the theory of the *Strachan* case there must be a "last payment" whereby the one-year time-bar of §922 is triggered. As there was no such "last payment" in the *Jones'* case, the time-bar of §922 cannot be applied.

Conceding *en arguendo* that *Strachan* was wrongly decided on the basis set forth by the appellate court below in *Jones*, there is no need for this rejection of the *Strachan* case to create a conflict with the Fifth Circuit. The appellate court in *Jones* below merely did not distinguish the facts in reaching what is a correct result. It may be that the deputy commissioner in *Strachan* should have joined in the petition to this Court for review of the Fifth Circuit's decision on the grounds that an important question of Federal law not heretofore decided by this Court should be so decided, and because the decision in that case had so far departed from the accepted course of judicial proceedings so as to call for the exercise of this Court's power of supervision. U.S. S.Ct. Rule 19(b). This, however, is not before this Court.

In like manner the precedent cited by Petitioners (Petition, pgs. 11-12) as providing a similar interpretation as in *Strachan* are all unreported cases or do not constitute precedent. Whether or not appeal or review should have been sought in those cases is not in issue here.

All of the above being so, it is respectfully suggested that Petitioners' reasons for granting the Writ, numbers II, III, IV, V and VI (Petition, pgs. 10-20), cannot become applicable.

The application of §922 under the facts in *Strachan*, where an agreed "last payment" of compensation for permanent disability has been paid, not having been ruled upon in another circuit, it would appear that there is no necessity for the Court to exercise its discretion to issue the Writ, for naught else appearing " * * * time may further illumine or completely outmode the issues in dispute". *Rice v. Sioux City*

Memorial Park Cemetery 349 U.S. 70, 77, 99 L.Ed. 897, 903, 75 S.Ct. 614 (1954). Until a conflict between the circuits does occur on the same facts as in *Strachan*, a dismissal of the petition would of itself serve as an endorsement to the appellate court's judgment below as to the claimant, Jones.

CONCLUSION

For the reasons set forth above it is respectfully suggested that the petition for Writ of Certiorari should not be granted.

SERVICE

Copies hereof have been provided to counsel of record: John C. Duncan III, Esq., for Petitioners; to the Solicitor General, and Leavenworth Colley, Esq., Special Assistant to the Solicitor General of the Department of Justice, and to William J. Kilberg, Esq., Solicitor, James G. Johnstone, Esq., Acting Associate Solicitor, and George M. Lilly, Esq., of the Department of Labor, for Respondents, pursuant to U.S. S.Ct. Rule 33.

Dated: 25 October 1974

/s/ JEFFERSON de R. CAPPS

JEFFERSON de R. CAPPS
3446 Fifth Avenue North
St. Petersburg, FL 33713
Attorney for Respondent, Mary Jones

APPENDIX

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act CHARLES E. JONES, *Claimant,* vs. INTERCOUNTY CONSTRUCTION CORPORATION, *Employer,* HARTFORD ACCIDENT AND INDEMNITY COMPANY, *Insurance Carrier,*	COMPENSATION ORDER REJECTION OF CLAIM FOR ADDITIONAL COMPENSATION AWARD OF MEDICAL EXPENSES CASE NO. 15144-49

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

1. That on July 19, 1960, the claimant above named was in the employ of the employer above named, whose address is 4744 Baltimore Avenue, Hyattsville, Maryland; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled, "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes"; that the liability of the employer for

compensation under the said Act was insured by Hartford Accident and Indemnity Company;

2. That on the said day the claimant, while performing services for the employer as a pile driver at a job site in the District of Columbia, fell a distance of about 20 feet to the ground and landed on his head and was rendered unconscious; that as a consequence of which he suffered an injury diagnosed as fracture of the right zygoma, right infra orbital ridge, nose and left ulna;

3. That the claimant had previously suffered several non-work related injuries with no findings of permanent disability and after a short period of disability he was able to resume and perform the duties of his regular employment until the injury of July 19, 1960; that subsequent to the injury of July 19, 1960, the substantial medical evidence establishes that the claimant suffered a severe organic personality alteration, secondary to brain damage which superimposed upon his preexisting socipathic (*sic*) personality caused a greater disability to the extent that rehabilitation for gainful employment in the open labor market was not possible; that such disability is permanent in nature, and as a consequence he requires continuous medical treatment and frequent hospitalization; that the injury arose out of and in the course of the employment;

4. That the employer and insurance carrier furnished to the claimant partial medical and hospital care in accordance with Section 7(a) of the Act; that the claimant obtained such additional medical and hospital care as required by the injury; that on October 7, 1963 and June 22, 1965, the employer and insurance carrier received medical information relating to said treatment to the injury of July 19, 1960;

5. That written notice of the injury was not given to the employer within thirty days, but the employer had

knowledge of the injury and was not prejudiced by the lack of such written notice;

6. That the claimant filed a claim for payment of compensation on August 12, 1960;

7. That the average weekly wages of the claimant at the time of injury were $81.00;

8. That the employer and insurance carrier voluntarily paid compensation to the claimant from July 20, 1960 to April 20, 1965, 248 weeks, inclusive, at the rate of $54 per week for temporary total disability, amounting to $13,392; and from April 21, 1965 to January 23, 1968, inclusive, 144 weeks at the rate of $27 per week, based upon 50 per cent permanent partial disability (*sic*: see footnote below), amounting to $3,888, or a total of $17,280, the statutory limit for temporary total disability and permanent partial disability;

9. That on June 8, 1966, the claimant was declared incompetent by County Judge Ray E. Ulmer of Pinellas County, the State of Florida, and his wife was appointed his guardian;

10. That on February 11, 1970, the claimant's attorney filed claim for payment of additional compensation based upon permanent total disability; that on December 21, 1970, at a hearing first held to consider claimant's claim, the employer and insurance carrier contended that said claim was barred since the claim was not filed within one (1) year after the date of the last payment of compensation, made on

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The deputy commissioner incorrectly referred to this payment as being "permanent partial disability" whereas the payment of $3,888 was for temporary partial disability, see copy of Bureau of Employees' Compensation Form BEC -208A, Notice Compensation Payment Stopped or Suspended, dated January 23, 1968 at Petitioners' App. 14a.

January 23, 1968, in accordance with Section 13(a) of the District of Columbia Workmen's Compensation Act.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the employer and insurance carrier shall pay reasonable cost of all medical and hospital care required by the claimant as a result of the injury of July 19, 1970 (*sic*: 1960).

Upon the foregoing findings of fact, it is further ordered by the Deputy Commissioner that the claim for additional payment of compensation for permanent total disability be and the same hereby is REJECTED for the following reason:

That the claim for payment of additional compensation was not filed within a year of January 23, 1968, the date on which the last installment of compensation was paid to the claimant in accordance with Section 13(a) of the District of Columbia Workmen's Compensation Act.

Given under my hand and filed at Washington, D.C. this twenty-fourth day of May, 1971

/s/ NOAH C. A. WALTER

NOAH C. A. WALTER
Deputy Commissioner
District of Columbia
Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by certified mail to the claimant's guardian, the employer, the insurance carrier (local office and state office), attorney for the claimant, and the attorneys for the respondents at the last known address of each as follows:

NAME	ADDRESS
Mrs. Mary A. Jones	2517 Third Avenue North St. Petersburg, Florida 33713
Intercounty Construction Corp.	Post Office Box 329 Hyattsville, Maryland 21281
Hartford Accident and Indemnity Company	Post Office Box 12691 St. Petersburg, Florida 33733
Hartford Accident and Indemnity Company	1101 - 17th Street, N.W. Washington, D. C. 20036
Jefferson de R. Capps, Esquire	3446 Fifth Avenue North St. Petersburg, Florida 33713
Kurt Preston Hampp, Esquire Roney, Ulmer, Woodworth & Jacobs, Attorneys at Law	445 - 31st Street North St. Petersburg, Florida 33733

/s/ NOAH C.A. WALTER

Deputy Commissioner

Mailed: May 24, 1971